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WELLS FARGO BANK, N.A., successor by merger with Wells Fargo Bank Southwest, N.A., f/k/a Wachovia Mortgage, FSB, f/k/a World Savings Bank, FSB ("Wells Fargo")

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

FIDEL CASTILLO AND OLGA O. CASTILLO,

Plaintiffs,

v.

WELLS FARGO BANK, N.A. and DOES 1-10, inclusive,

Defendants.

CASE NO.: 2:13-cv-08931-ODW(SHx)

**DEFENDANT WELLS FARGO'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES**

Date: April 7, 2014
Time: 1:30 p.m.
Ctrm: 11

[Assigned to the Hon. Otis D. Wright II]

**TO PLAINTIFFS AND THEIR COUNSEL OF RECORD:**

**PLEASE TAKE NOTICE** that on April 7, 2014, at 1:30 p.m. in Courtroom 11 of the above-entitled Court, located at 312 N. Spring Street, Los Angeles, California, 90012 the Honorable Otis D. Wright presiding, defendant

Wells Fargo Bank, N.A., successor by merger with Wells Fargo Bank Southwest, N.A., formerly known as Wachovia Mortgage, FSB, formerly known as World Savings Bank, FSB ("Wells Fargo"), will move, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for an order dismissing all of the claims for relief in plaintiffs' first amended complaint ("FAC"). Grounds for the motion to dismiss are that plaintiffs do not plead facts sufficient to state claims for relief, specifically:

1. **First Claim for Relief – Fraudulent Concealment**

Plaintiffs' claim for relief for fraudulent concealment fails because: (1) it is time-barred; and (2) it is barred by the doctrine of res judicata.

2. **Second Claim for Relief – Intentional Misrepresentation**

Plaintiffs' claim for relief for intentional misrepresentation fails because: (1) it is time-barred; and (2) it is barred by the doctrine of res judicata.

3. **Third Claim for Relief – Negligent Misrepresentation**

Plaintiffs' claim for relief for negligent misrepresentation fails because: (1) it is time-barred; (2) Wells Fargo does not owe a duty of care as a matter of law; and (3) it is barred by the doctrine of res judicata.

4. **Fourth Claim for Relief – Breach of Contract**

Plaintiffs' claim for relief for breach of contract fails because: (1) plaintiffs fail to allege any breach of the contract; (2) it is barred by the doctrine of res judicata; and (3) it is time-barred.

5. **Fifth Claim for Relief – Breach of Implied Covenant of Good Faith and Fair Dealing**

Plaintiffs' claim for relief for breach of implied covenant of good faith and fair dealing fails because: (1) it is time-barred; (2) it is barred by the doctrine of res judicata; (3) plaintiffs have not alleged their own performance of the contract and have not explained their failure to perform; and (4) the parties' written agreements do not require Wells Fargo to modify the terms of plaintiffs' loan.

/ / /

6. **Sixth Claim for Relief – Violations of CA B & P § 17200**

Plaintiffs fail to state a claim for relief for violation of the Business & Professions Code § 17200 ("UCL") because: (1) plaintiffs lack standing because they have suffered no loss of money or property; (2) their predicate claims fail; (3) it is barred by res judicata; and (4) it is time-barred.

This motion is based on this notice, the memorandum of points and authorities, the request for judicial notice, the first amended complaint, and on Wells Fargo's argument at hearing.

**Compliance with Local Rule 7-3.** Pursuant to L.R. 7-3, counsel for Wells Fargo attempted to meet and confer on January 28, 2014. Plaintiffs' counsel has not responded.

Respectfully submitted,

Dated: February 21, 2014

ANGLIN, FLEWELLING, RASMUSSEN, CAMPBELL & TRYTTEN LLP

By: /s/ Jane K. Lee
Jane K. Lee
Attorneys for Defendant
WELLS FARGO BANK, N.A., successor by merger with Wells Fargo Bank Southwest, N.A., f/k/a Wachovia Mortgage, FSB, f/k/a World Savings Bank, FSB ("Wells Fargo")

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# MEMORANDUM OF POINTS AND AUTHORITIES

## 1. INTRODUCTION

This action arises from a mortgage loan made to plaintiffs in 2007, by World Savings Bank, FSB, a predecessor to Wells Fargo. Nearly seven years later, plaintiffs complain about the terms of the loan; specifically, the negative amortization feature. As an afterthought, they make passing reference to an unfair review of a loan modification application under the federal government's Home Affordable Modification Program ("HAMP").

This lawsuit is largely time-barred. It is also barred by the doctrine of res judicata. Not one of the six claims for relief states is actionable, for the reasons briefed below.

## 2. SUMMARY OF THE FIRST AMENDED COMPLAINT AND JUDICIALLY NOTICEABLE DOCUMENTS

On December 18, 2007, plaintiffs borrowed $365,000.00 from World Savings Bank, FSB ("World Savings"). FAC ¶ 7. The loan was memorialized in a note and secured by a deed of trust recorded against 1126 Raymond Avenue, Glendale, California 91201. Copies of the note and deed of trust are attached to the request for judicial notice ("RJN") as Exhibits 1 and 2.[1]

In their first three claims for concealment as well as intentional and negligent misrepresentation, plaintiffs allege that, over six years ago, Wells Fargo

[1] World Savings Bank, FSB was a federal savings bank, evidenced by the Certificate of Corporate Existence issued by the Office of Thrift Supervision ("OTS") that is attached to the RJN as Exhibit 3. It was renamed Wachovia Mortgage, FSB, evidenced by a November 19, 2007 letter from the OTS, a copy of which is attached to the RJN as Exhibit 4. Effective November 1, 2009, Wachovia Mortgage FSB was converted to a national bank with the name Wells Fargo Bank Southwest, N.A. and merged into Wells Fargo Bank, N.A. A copy of the Official Certification of the Comptroller of the Currency is attached to the RJN as Exhibit 5. A copy of the historical profile for World Savings Bank, FSB published by the Federal Insurance Deposit Corporation, which described these events is attached to the RJN as Exhibit 6.

concealed the negative amortization term of the loan (FAC ¶¶ 21, 29, 38). The fourth claim for breach of contract puts a similar spin on the negative amortization. It alleges that "their loan terms were in violation of CA Financial Code § 4973(c)" (FAC ¶ 46) and that Wells Fargo breached its "obligation [to] modify the loan if the law interpreted that the interest or other charges collected exceeds the permitted limits." (FAC ¶ 47) (emphasis original).

In their fifth claim for relief, plaintiffs contend that Wells Fargo breached the implied covenant of good faith and fair dealing because the "negative amortization rider … ensured that Plaintiff could not pay down their principal balance." (FAC ¶ 58.) Later in that fifth claim, plaintiffs refer to the lack of a "good faith review for a HAMP loan modification and [Wells Fargo] thus interfered with their right to receive the benefits bargained for such under their loan contracts." (FAC ¶ 64.)

The sixth claim, for § 17200 violations, is a grab bag of earlier predicate claims. (FAC ¶¶ 69-70.)

### 3. THE NEGATIVE AMORTIZATION CLAIMS HAVE ALREADY BEEN LITIGATED AND SETTLED

Plaintiffs are well aware of the "Pick-A-Payment" class action that applied to their loan and that involved the same negative amortization claims that plaintiffs allege here. (RJN, Exh. 7; FAC ¶¶ 9-10.) Plaintiffs were included in the class and did not opt out. (RJN, Exh. 8.) Approval of the Class Action Settlement resulted in a dismissal of claims *with prejudice*. (RJN, Exh. 9.)

A court-approved class action settlement serves to bar future claims of class members because, "restricting the res judicata effect of class action settlements would lessen a defendant's incentive to settle." *Durkin v. Shea & Gould*, 92 F. 3d 1510, 1518 (9th Cir. 1996) (*quoting*, *Valerio v. Boise Cascade Corp.*, 80 F.R.D. 626, 649 (N.D. Cal. 1978); *see also, TBK Partners, Ltd. v. Western Union Corp.,* 675 F. 2d 456, 460 (2d Cir. 1982) ("in order to achieve a comprehensive settlement

that would prevent relitigation of settled questions at the core of a class action, a court may permit the release of a claim based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented and might not have been presentable in the class action").

The doctrine of res judicata or "claim preclusion" bars any claim that was actually raised in the prior litigation as well as any claims that *could have* been raised. *(Migra v. Warren City School Dist. Bd. of Education*, 465 U.S. 75, 77 (1984); *Cell Therapeutics, Inc. v. Lash Group*, Inc., 586 F. 3d 1204, 1212 (2010); *Villacres v. ABM Indus., Inc.*, 189 Cal. App. 4th 562 (2010)). Thus, it matters not if the prior action asserted the same legal theories or causes of action. Res judicata applies as long as the prior action arose out of the same transaction or series of transactions as the original action. (*Western Sys., Inc. v. Ulloa,* 958 F. 2d 864, 871 (9th Cir. 1992) *cert. denied* 506 U.S. 1050 (1993)).

As the Court noted in the order approving the Pick-A-Payment class action, plaintiffs there alleged that the Pick-A-Payment loans violated the Truth in Lending Act and state law because the loan documents purportedly "failed to make adequate disclosures regarding the certainty of negative amortization, the actual payment schedules, the interest rates on which these schedules were based, and the full terms of the parties' legal obligations." (RJN, Exh. 9 at 2:10-14.)

Plaintiffs seek to relitigate these very claims in the first claim for fraudulent concealment, second claim for intentional misrepresentation, and third claim for negligent misrepresentation. (FAC. ¶¶ 18-24, 28-33, 38.) Plaintiffs' fourth claim (FAC ¶¶ 51, 52) recasts these claims as a breach of contract. Most of plaintiffs' fifth claim for breach of the implied covenant of good faith and fair dealing (FAC ¶¶ 58, 59) is also premised on negative amortization. All but several paragraphs in the sixth claim for § 17200 rely on the same barred claims. (FAC ¶¶ 76-78.)

Since these claims have already been litigated, plaintiffs cannot relitigate them here. *See, Pey v. Wachovia Mortg. Corp*., 2011 U.S. Dist. LEXIS 131699

(N.D. Cal. Nov. 15, 2011) (finding claims similar to plaintiffs' to be barred by the doctrine of res judicata as a result of the same class action settlement).

**4. THE FIRST AND SECOND CLAIMS FOR FRAUD ARE TIME-BARRED**

Plaintiffs' loan funded on December 18, 2007. (FAC ¶ 7; RJN, Exhs. 1, 2.) In connection with their first claim for fraudulent concealment, plaintiffs allege "[w]hen originating Plaintiffs' loan, World Savings provided Plaintiffs with ledgers …." (FAC ¶ 16.) "Repayment of Plaintiffs' loan according to the ledgers would result in negative amortization…." (FAC ¶ 17.)

With respect to plaintiffs' second claim for intentional misrepresentation, they similarly allege "World Savings, as discussed above, represented its ledgers provided Plaintiffs upon origination were repayment schedules for Plaintiffs' loan. These ledgers thus misrepresented Plaintiffs' interest rate, the fact of negative amortization …." (FAC ¶ 29.)

Plaintiffs were thus put on notice in December 2007, that their loan included a negative amortization term. California Code of Civil Procedure § 338 bars "an action for relief on the ground of fraud or mistake" three years from discovery. Hence, plaintiffs' first two claims for relief would be time-barred as of December 18, 2010. Nothing in the FAC suggests a later discovery date that would render these claims timely.

**5. THE THIRD CLAIM IS TIME-BARRED AND THERE IS NO TORT DUTY OF CARE**

Plaintiffs carry forward their fraud claims into the third claim for negligent misrepresentation: "Where Defendants did not know their representations as stated above were false, they made them while having no reasonable grounds for believing they were true." (FAC ¶ 38.) C.C.P. § 355.1 provides that claims for negligence must be brought within two years. Because the "negligent misrepresentation" occurred at the loan origination in 2007, it was time-barred on

December 18, 2009. Even if the three-year fraud statute applies, the claim was time-barred in December 2010.

This time-barred claim also fails because there is no tort duty of care. "As is true of negligence, responsibility for negligent misrepresentation rests upon the existence of a legal duty…." (*Eddy v. Sharp*, 199 Cal. App. 3d 858, 864 (1988)). "The determination of whether a duty exists is primarily a question of law." *Id*. In *Nymark v. Heart Federal Savings & Loan Ass'n*, 231 Cal. App. 3d 1089, 1095 (1991), the Court held: "[A]s a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money."[2] *See also, Lueras v. BAC Home Loans Servicing*, LP, 221 Cal. App. 4th 49, 67-68 (2013) ("We conclude a loan modification is the renegotiation of loan terms, which falls squarely within the scope of a lending institution's conventional role as a lender of money.… The Biakanja factors do not support imposition of a common law duty to offer or approve a loan modification … [or] a duty of care to handle [a borrower's] loan in such a way to prevent foreclosure and forfeiture of his property"). Here, Wells Fargo's alleged misconduct is in the origination of the loan, which is conduct that is well within the bounds of its conventional role as a mere lender. Thus, plaintiffs cannot establish a duty of care required to state a claim for negligent misrepresentation.

**6. PLAINTIFFS' TIME-BARRED FOURTH CLAIM FOR RELIEF FOR BREACH OF CONTRACT FAILS**

Plaintiffs must plead (1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff. (*Careau & Co. v. Security Pacific Business Credit, Inc*., 222 Cal. App.

[2] *See*, *Jolley v. Chase Home Finance, LLC*, 213 Cal. App. 4th 872 (2013) for contrary view, in the context of a construction loan.

3d 1371, 1388 (1990)).

Plaintiffs' contract claim arises from a clause in the deed of trust entitled "maximum loan charges" that provides: "If the loan secured by this Security instrument is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other charges collected or to be collected in connection with the loan exceed permitted limits, then (A) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit, and (B) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower…." (RJN, Exh. 2.)

Plaintiffs allege that California Fin. Code § 4973(c) is such a law. (FAC ¶¶ 46-48.) Section 4973 provides: "The following are prohibited acts and limitations for covered loans … (c) a covered loan shall not contain a provision for negative amortization such that the payment schedule for regular monthly payments causes the principal balance to increase, unless the covered loan is a first mortgage and the person who originates the loan discloses to the consumer that the loan contains a negative amortization provision that may add principal to the balance of the loan."

Plaintiffs' argument suffers from a number of defects.

First, plaintiffs fail to allege the loan is a "covered loan" subject to Cal. Fin. Code § 4973. Cal. Fin. Code § 4970 defines a "covered loan" as:

> [A] consumer loan in which the original principal balance of the loan does not exceed the most current conforming loan limit for a single-family first mortgage loan established by the Federal National Mortgage Association in the case of a mortgage or deed of trust, and where one of the following conditions are met: (1) For a mortgage or deed of trust, the annual percentage rate at consummation of the transaction will exceed by more than eight percentage points the yield on Treasury securities

> having comparable periods of maturity on the 15th day of the month immediately preceding the month in which the application for the extension of credit is received by the creditor.

Cal. Fin. Code § 4970(b)(1). Plaintiffs do not even suggest, let alone expressly allege, any facts that the loan secured by the deed of trust is a "covered loan."

Even if the loan were a "covered loan," § 4973(c) provides an exception for a first mortgage where the lender "discloses to the consumer that the loan contains a negative amortization provision that may add principal to the balance of the loan." Pertinent here is the note, which provides that, "[f]rom time to time, my monthly payments may be insufficient to pay the total amount of monthly interest that is due. If this occurs, the amount of interest that is not paid each month, called 'Deferred Interest,' will be added to my Principal and will accrue interest at the same rate as the Principal." (RJN, Exh. 1, ¶ 2E). Thus, given this disclosure, § 4973 does not apply here.

Moreover, plaintiffs allege no facts that § 4973 is a "law which sets maximum loan charges." Nor do plaintiffs allege that § 4973 was "finally interpreted so that the interest or other loan charges collected or to be collected in connection with the loan exceeded permitted limits."

The claim is also time-barred under the one-year and four-year statutes. The court, in *Gutierrez v. PNC Mort.,* 2012 U.S. Dist. LEXIS 41890 *8 (S.D. Cal. Mar. 26, 2012) held in a case involving Financial Code § 4973:

> *Section 340* of the California Code of Civil Procedure provides a one-year limitation period for penalty statutes unless the applicable statute provides a different limitation period (*Cal. Code Civ. Proc. §340* (2003); *See, Id. § 338(a)*(providing that three-year statute of limitations applies to statutes not involving penalties)). Because *section 4977* permits a statutory penalty and *section 4978* permits a

civil remedy for violations under *section 4973* but does not provide a separate statute of limitations, the one-year period under *section* 340 applies.

As noted earlier, plaintiffs' claim arose out of the loan origination and accrued at the loan's consummation in December 2007. (RJN, Exhs. 1, 2.) Plaintiffs' claim thus expired in December 2008.

Even if the four-year statute of limitations for breach of written contract applies, plaintiffs' claim expired in December 2011, four years after the loan origination in 2007. (C.C.P. §337, providing four-year statute of limitations based on a written contract.)

**7. PLAINTIFFS' FIFTH CLAIM FOR BREACH OF GOOD FAITH AND FAIR DEALING FAILS**

Plaintiffs allege that Wells Fargo breached the implied covenant of good faith and fair dealing by the negative amortization feature of the loan. (FAC ¶¶ 58, 59.) Plaintiffs also allege that language in the deed of trust promises that refinancing would be available to them "down the road." (FAC ¶ 61.) Finally, plaintiffs allege that they applied for a HAMP loan modification, which Wells Fargo "unfairly neglected." (FAC ¶¶ 62-64.)

"To establish a breach of an implied covenant of good faith and fair dealing, a plaintiff must establish the existence of a contractual obligation, along with conduct that frustrates the other party's rights to benefit from the contract." (*Fortaleza v. PNC Fin. Servs. Group, Inc.,* 642 F. Supp. 2d 1012, 1021-22 (N.D. Cal. 2009) (*citing Racine & Laramie v. Dep't of Parks & Rec.,* 11 Cal. App. 4th 1026, 1031 (1992)). The "implied covenant of good faith and fair dealing is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated by the contract." (*Pasadena Live, LLC v. City of Pasadena,* 114 Cal. App. 4th 1089, 1093-94 (2004). *See also*, *Guz v. Bechtel Nat. Inc.,* 24 Cal 4th 317, 349-50

(2000) "[T]he implied covenant will only be recognized to further the contract's purpose; it will not be read into a contract to prohibit a party from doing that which is expressly permitted by the agreement itself." *Wolf v. Walt Disney Pictures and Television,* 162 Cal. App.4th 1107, 1120 (2008)).

The first breach purportedly arose from a clause in the deed of trust stating that "Plaintiffs would pay 'all of the principal and interest due under the Secured Note.' …. The negative rider, however, ensured that Plaintiff could not pay down their principal balance. …Wells Fargo – thus violated the deed of trust in never applying Plaintiffs' repayments to their principal." (FAC ¶ 58.) Yet, the obligation to repay the note expressly belongs to plaintiffs – the borrowers. And assuming the "negative amortization rider" is part of the contract, Wells Fargo applied the payment pursuant to the contract. (FAC ¶ 58.)

Plaintiffs also allege that the "use of negative amortization also breached what the loan contract indicated … that if Plaintiffs made the prescribed monthly repayments presented, then they would repay their loan successfully and without penalty, which was also to include any type of increased payment. Negative amortization, however, absolutely disallowed this." (FAC ¶ 59.) This allegation, too, is based on plaintiffs' express covenant under the contract "to pay to Lender, on time, all principal and interest due under the Secured Notes …." (RJN, Exh. 2, pg. 3.)

The second purported breach is based on the following language in the deed of trust, which states, "[t]he secured note may be renewed or negotiated." (FAC ¶ 61.) Plaintiffs thus believe that Wells Fargo "promised Plaintiffs refinancing was available to them down the road" (FAC ¶ 61) but this was somehow impaired (FAC ¶ 66). The unedited statement in the deed of trust is: "[t]his is a first deed of trust which secures a note which contains provisions allowing for changes in my payment amount and principal balance (including future advances and deferred interest). At lender's option the secured note may

be renewed or negotiated." (RJN, Exh. 2, emphasis added.) Plaintiffs provide no facts that would support an interpretation of this language as a promise to refinance. (FAC ¶ 61.)

The last purported breach is based on plaintiffs' alleged application for a HAMP loan modification. (FAC ¶ 62.) Plaintiffs allege that "[d]efendants unfairly neglected Plaintiffs good faith review for a HAMP loan modification and thus interfered with their right to receive the benefits bargained for under their loan contract." (FAC ¶ 64.) What plaintiffs bargained for and agreed to is the following language in the deed of trust: "[t]his Security Instrument may be modified or amended only by an agreement in writing signed by Borrower and Lender." (RJN Ex. 2, ¶23.) From this clause, apparently, plaintiffs pull an implied covenant forcing Wells Fargo to modify their loan. That is hardly an implied covenant that "rests upon the existence of some specific contractual obligation." (*Racine, supra,* 1031.)

What's more, plaintiffs have no private right of action under HAMP. (*Hoffman v. Bank of America, N.A.*, 2010 U.S. Dist. LEXIS 70455, at *15 (N.D. Cal., June 30, 2010) ("lenders are not required to make loan modifications for borrowers that qualify under HAMP nor does the servicer's agreement confer an enforceable right on the borrower"); *Villa v. Wells Fargo Bank, N.A.*, 2010 U.S. Dist. LEXIS 23741, at *6-*7 (S.D. Cal., Mar. 15, 2010) ("[T]he HAMP agreement did not require loan servicers to modify eligible loans; thus, the court found borrowers lacked standing to enforce the agreement")).

**8. PLAINTIFFS' UCL CLAIM IS FATALLY DEFECTIVE**

**A. The UCL Claim is Time-Barred**

Business and Professions § 17208 provides a four-year statute of limitations for this claim. All of the incorporated loan origination claims are time-barred, as briefed above. Plaintiffs' UCL claim is likewise time-barred, based on § 17208. Plaintiffs' claim accrued in December 2007 and expired in December 2011. (FAC

Exh; 7; RJN, Exh 1, 2.) The HAMP review claims may be time-barred depending on when the HAMP review occurred.

**B. Plaintiffs Lack Standing to Assert A UCL Claim**

To sue under California's Unfair Competition Law ("UCL"), "[a] private plaintiff must make a two-fold showing: he or she must demonstrate injury in fact and a loss of money or property caused by unfair competition." *Peterson v. Cellco P'ship*, 164 Cal. App. 4th 1583, 1590 (2008); *see also, Daro v. Superior Court*, 151 Cal. App. 4th 1079, 1098 (2007) ("Thus, a private person has no standing under the UCL unless that person can establish that the injury suffered and the loss of property or money resulted from conduct that fits within one of the categories of 'unfair competition' in section 17200.").

Plaintiffs conclude without alleging any facts that as Wells Fargo's "practices stand to rob Plaintiffs of their home in foreclosure; to date, they have sunk the equity of Plaintiffs' home and put them under water financially via excessive monthly repayments that kicked in when their loan recast, etc." (FAC ¶ 76.)

First, the possibility of a foreclosure, and loss of equity, if any, would be the result of plaintiffs' failure to pay their mortgage, not because of Wells Fargo's conduct. In a similar situation, the Court in *DeLeon v. Wells Fargo Bank, N.A.*, 2011 U.S. Dist. LEXIS 8296 (N.D. Cal. 2011), held that the borrowers did not state a claim for violation of UCL:

> The Court cannot reasonably infer that Wells Fargo's alleged misrepresentations resulted in the loss of Plaintiffs' home. Rather, the facts alleged suggest that Plaintiffs lost their home because they became unable to keep up with monthly payments and lacked the financial resources to cure the default. Although the Court understands Plaintiffs' frustrations with Wells Fargo's seemingly contradictory statements and actions, it does

> not appear that this conduct resulted in a loss of money or property.

*Id*. at *19-22. Because plaintiffs do not aver any injury in fact, their UCL claim must be dismissed.

**C. Plaintiffs Have Not Alleged Any UCL Violation**

Even if plaintiffs had alleged standing, they have not plead any violation of the UCL. It is well established that a claim under the UCL must state with reasonable particularity the facts supporting the elements of the alleged violation (*Khoury v. Maly's, Inc.*, 14 Cal. App. 4th 612, 619 (1993)), and an allegation of particular facts showing ongoing, unlawful, unfair, and fraudulent business acts on the part of the defendant is required. (*Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1143 (2003); *Khoury*, 14 Cal. App. 4th at 619; *Nguyen v. Wells Fargo Bank, N.A.*, 749 F. Supp. 2d 1022, 1037 (N.D. Cal. 2010) ("this cause of action is derivative of some other illegal conduct or fraud committed by a defendant, and a plaintiff must state with reasonable particularity the facts supporting the statutory elements of the violation")).

First, the "unlawful" prong requires a viable predicate claim because it borrows statutory or constitutional claims from elsewhere. (*Melegrito v. CitiMortgage Inc.*, 2011 U.S. Dist. LEXIS 60447, *24 (N.D. Cal. June 6, 2011)). "A defendant cannot be liable under § 17200 for committing 'unlawful business practices' without having violated another law." (*Ingels v. Westwood One Broadcasting Services, Inc.*, 129 Cal. App. 4th 1050, 1060 (2005) (citations omitted)). As briefed above, none of plaintiffs' claims is actionable.

Second, the "unfair" prong applies when the practice at issue allegedly violates "the policy or spirit of [anti-trust] laws because its effects are comparable to a violation of the law, or that otherwise significantly threatens or harms competition." (*Cel-Tech Comm'cns, Inc., v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 187 (1999)).

The California Supreme Court further explained that the "unfair" prong applies to business practices that offend an established "public policy or when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to customers." *Id*. at 187. Plaintiffs' allegations that "Defendants unfairly placed Plaintiffs in a predatory loan" (FAC ¶ 74) and "unfairly denied Plaintiffs a HAMP modification" (FAC ¶ 75) are not only factually devoid, they are not "unfair" as defined by *Cel-Tech*.

The "fraudulent" prong is premised on plaintiffs' conclusion that "Defendants committed fraud in concealing material information." (FAC ¶ 82.) However, plaintiffs fail to allege any facts as to the material information concealed, let alone to the level of specificity required by Rule 9(b). Plaintiffs' reference to their fraud-based claims is meritless because those claims are time-barred, barred by res judicata, and otherwise not properly pled.

Indeed, a UCL claim "cannot be used to state a cause of action the gist of which is absolutely barred under some other principle of law." *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553, 566 (1998); *Cel-Tech Communications, Inc.,* 20 Cal. 4th at 182 ("A court may not allow a plaintiff to 'plead around an absolute bar to relief simply by recasting the cause of action as one for unfair competition.'").

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## 9. CONCLUSION

For the foregoing reasons, Wells Fargo requests an order granting this motion without leave to amend and dismissing this action with prejudice.

Respectfully submitted,

Dated: February 21, 2014

ANGLIN, FLEWELLING, RASMUSSEN, CAMPBELL & TRYTTEN LLP

By: /s/ Jane K. Lee
Jane K. Lee
Attorneys for Defendant
WELLS FARGO BANK, N.A., successor by merger with Wells Fargo Bank Southwest, N.A., f/k/a Wachovia Mortgage, FSB, f/k/a World Savings Bank, FSB ("Wells Fargo")

## CERTIFICATE OF SERVICE

I, the undersigned, declare that I am over the age of 18 and am not a party to this action. I am employed in the City of Pasadena, California; my business address is Anglin, Flewelling, Rasmussen, Campbell & Trytten LLP, 199 S. Los Robles Avenue, Suite 600, Pasadena, California 91101-2459.

On the date below, I served a copy of the foregoing document entitled:

**DEFENDANT WELLS FARGO'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES**

on the interested parties in said case as follows:

**Served Electronically Via the Court's CM/ECF System**

*Attorneys for Plaintiffs:*

John E. Mortimer, Esq.
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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. I declare that I am employed in the office of a member of the Bar of this Court, at whose direction the service was made. This declaration is executed in Pasadena, California on February 21, 2014.

| Marianne Mantoen | */s/ Marianne Mantoen* |
|---|---|
| (Type or Print Name) | (Signature of Declarant) |